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Nos. 82-1951 and 82-1913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeals From The United States District Court For The Western District Of Texas

MOTION FOR LEAVE TO FILE, AND BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF APPELLEES

16pp

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Institute of Municipal Law Officers [NIMLO], pursuant to rule 36.4, moves the Court for leave to file the attached brief as *amicus curiae* in support of the appellees, San Antonio Metropolitan Transit Authority, *et al.* This motion and brief is filed on behalf of NIMLO and the local governments whose chief legal officers have signed the brief.

NIMLO submits that its brief can assist the Court in evaluating the importance of mass transit operations to local governments. In addition, the brief can assist the Court in determining the suitability of publicly owned mass transit systems for Tenth Amendment protection from federal encroachment. NIMLO's interest in this case is set out in the Interest of the Amicus Curiae section of the attached brief. That brief sets out facts demonstrating the essential nature of mass transit operations to local governments and shows the historic relationship between state and local governments and mass transit systems.

Because of the increasing role of public ownership of transit operations, this case is of nationwide importance, and, we submit, the attached *amicus curiae* brief will assist the Court in evaluating the nationwide importance and impact of the decision in this case.

Therefore, we urge the Court to grant NIMLO leave to file the attached brief as *amicus curiae.*

Respectfully submitted,

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Appellee San Antonio Metropolitan Transit Authority, has withheld consent.

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BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed on behalf of the more than 1,600 local governments, or political subdivisions of states, which are members of the National Institute of Municipal Law Officers [NIMLO]. The member local governments operate NIMLO through their chief legal officers, variously called city attorney, county attorney, corporation counsel, city solicitor, director of law, and other

titles. Each member local government has one vote on all actions taken by the NIMLO organization. This brief *amicus curiae* is signed by the chief legal officers of NIMLO members on behalf of their own local governments and the chief legal officers of the members of NIMLO in their official capacity. San Antonio, Texas is a member of NIMLO.

NIMLO is a nonpartisan, nonpolitical, fact-gathering and reporting organization that provides information and research to its member local governments on current legal problems of local concern, including mass transit labor issues and issues involving federal-local relations.

The local government attorneys who participate in NIMLO's work are responsible for negotiating and drafting labor contracts with municipal employee unions, including mass transit employee unions. The attorneys are also intimately involved in the budgetary processes of local governments, and are responsible for advising local governments on the applicability of federal statutes and regulations to municipal mass transit activities.

NIMLO is greatly concerned that a reversal of the opinion below will result in a combination of an increase in transit rates for the tens of millions of transit riders in this Nation and a reduction in the quality and quantity of the mass transit services provided. Those least able to pay the increased fares, the poor and the elderly, will be harmed the most. NIMLO is equally concerned that an adverse ruling will deprive state and local governments of the right to regulate, free from federal intrusion, the wages and hours of their employees providing other traditional and essential governmental services. The Tenth Amendment guarantees them this right. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

NIMLO, therefore, respectfully urges this Court to affirm the opinion below that mass transit is a traditional governmental function entitled to Tenth Amendment immunity. This will protect the transit riding public from harm and preserve the independent integrity of state and local governments that is essential to the operation of our federalist system.

STATEMENT OF THE CASE

The Statement of the Case set forth in Appellee American Public Transit Association's Motion to Affirm is adopted by the National Institute of Municipal Law Officers for purposes of this brief *amicus curiae*.

SUMMARY OF ARGUMENT

Publicly owned mass transit systems today are the predominant providers of mass transit services. Mass transit has become an integral component of state and local government land use planning, and it serves crucial environmental, social, and economic goals.

Historically, mass transit has been a concern of state and local governments, with minimal federal intrusion. State and local governments have long been involved with mass transit systems as franchisors and regulators, but severe economic problems, coupled with the desire to increase the scope of services provided by mass transit, have recently compelled governmental takeovers of regulated private transit operations.

Mass transit today is a traditional and integral function of state and local government. The Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981) [FLSA],

impermissibly imposes federal minimum wage and maximum hour regulations on local mass transit operations. The imposition of the FLSA on local public transit operations places a severe financial burden on local transit systems and directly imposes hardships on all classes of transit riders, but especially the poor and the elderly.

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court held that the minimum wage and maximum hours provisions of the FLSA could not constitutionally be applied to the integral and traditional operations of state and local governments. When Congress attempts to displace directly the state and local governments' freedom to structure integral operations in areas of traditional governmental functions, it exceeds its grant of authority under the Commerce Clause.[1]

The basic holding of *National League of Cities* has been reaffirmed by this Court on numerous occasions, most recently last Term in *EEOC v. Wyoming*, 103 S.Ct. 1054 (1983). See also *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982); *United Transportation Union v. Long Island Railroad Company*, 455 U.S. 678 (1982); *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981).

An examination into the current role of state and local governments in mass transit operations compels the conclusion that the operation of publicly owned mass transit systems is today a traditional governmental function. A study of the historical role played by state and local governments in transit operations buttresses this conclusion. Therefore, Congress' attempt to impose FLSA rules and regulations on publicly owned mass transit systems exceeds its authority under the Commerce Clause.

[1]U.S. CONST. art. I, § 8, cl. 3.

ARGUMENT

I. THE OPERATION OF PUBLICLY OWNED MASS TRANSIT SYSTEMS IS AN INTEGRAL AND TRADITIONAL FUNCTION OF STATE AND LOCAL GOVERNMENT

A. Mass Transit Today Is A Service Provided Almost Exclusively By State And Local Governments.

The term "traditional" has a variety of meanings, depending in part on the context of the particular issue. While the term "traditional" does imply an historic component, within the context of Tenth Amendment analysis "traditional" is not inexorably entwined with history. In fact, a strictly historic view of traditional functions has been explicitly rejected by this Court. *Long Island Railroad*, 455 U.S. at 686-87.[2]

Traditional, therefore, implies more than historical. A traditional function is a practice that is customary, common, pervasive, or routine. Under this kind of analysis, it is clear that in the area of mass transit operations, public ownership is a traditional governmental function. More than 250 of the 279 urbanized areas with populations over 50,000 people are served in whole or in part by publicly owned mass transit systems. Each of the 50 largest metropolitan areas is served by a publicly owned mass transit system.[3]

[2]"This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation." *Long Island Railroad*, 455 U.S. at 686-87.

[3]United States Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population*, at 1-12 (Aug. 1981).

An analysis of ridership statistics further demonstrates the predominance of state and local governments in mass transit operations. Ninety-four percent of all transit riders are carried on publicly owned mass transit systems. Ninety percent of all transit vehicles are owned and operated by public transit systems and these vehicles travel 93 percent of all the miles travelled by mass transit vehicles.[4]

B. Publicly Owned Mass Transit Systems Serve Important Local Goals.

Mass transit has become an important means of achieving governmental social, economic and environmental goals, such as serving special segments of society unable to afford other means of transportation, pollution control, energy conservation, and economic development and planning. These benefits accrue not just to transit riders, but to the public as a whole. The increased costs attendant upon application of the FLSA to publicly owned mass transit systems frustrates the achievement of these goals.

The poor, the elderly, and the handicapped are particularly dependent on publicly owned mass transit systems. A 1971 survey indicated that while 38 percent of people with incomes below $4,000 use bus services, only 28 percent of people with incomes over $15,000 ride buses.[5] A similar survey revealed that 70 percent of all bus and light-rail riders had incomes of $10,000 or less.[6] For the

[4]American Public Transit Association, *Transit Fact Book*, at 43 (1981 ed.).

[5]United States Department of Transportation, Urban Mass Transportation Administration, *Moving People, An Introduction To Public Transportation*, at 29 (1981).

[6]*Id.* at 35.

poor, many of whom do not own cars, publicly owned mass transit is the sole means of affordable transportation. Increased labor costs invariably lead to increased fares, which in turn make mass transit less accessible to those most dependent on it, the poor.

The elderly are similarly dependent on publicly owned mass transit. Many elderly individuals are physically unable to drive an automobile or have never learned to drive. In addition, many elderly individuals are too frightened to drive in congested urban areas or do not even own automobiles. As with the poor, the elderly are, to a large extent, dependent on publicly owned mass transit for their transportation.

Section 504 of the Rehabilitation Act[7] prohibits discrimination against the handicapped in any program receiving federal funds. In addition, § 16(a) of the Urban Mass Transportation Act[8] requires that "special efforts" be made to provide mass transportation to the elderly and handicapped. As these statutory commands are being implemented, more and more handicapped and elderly individuals will have access to publicly owned mass transit systems.

Besides providing transportation for special segments of the population, mass transit plays a crucial role in the economic development of municipalities and regional areas. For example, 78 percent of all office space constructed in San Francisco between 1962 and 1970 was constructed within a five-minute walk of Bay Area Rapid

[7]29 U.S.C. §794.

[8]49 U.S.C. §1612(a) (1976 & Supp. V. 1981).

Transit stations.[9] Similar developments have occurred in Chicago, Boston, and Philadelphia.[10] In the Washington D.C. area, municipal governments are clustering development projects around nearby Metrorail stations. It has been estimated that the subway system in Washington, D.C. will itself generate $6 billion worth of private development projects. The rapid transit system in San Francisco was estimated to have generated $1.4 billion worth of construction activity in that city.[11] For businesses considering relocating, proximity to mass transit is a primary factor in choosing a new site.[12]

The heightened economic activity caused by publicly owned mass transit is crucial to the financial viability of many metropolitan areas. New investments create jobs, thereby lessening unemployment. In addition, the operation of a transit system itself creates numerous employment opportunities. Increased property values resulting from new development broaden the tax base and increase tax revenues. The improved economic climate benefits the entire community.

Another benefit realized from mass transit is a significant reduction in air pollution. It has been estimated that for 1980 alone, mass transit reduced the amount of hydrocarbons by 15,000 tons, reduced carbon monoxide by 147,000 tons, reduced nitrogen oxide by 35,000 tons,

[9] *Moving People, supra* note 5, at 31.

[10] "Public Transit and Downtown Development," *Metropolitan*, at 48 (May-June 1980).

[11] *Transit Fact Book, supra* note 4, at 22.

[12] *Moving People, supra* note 5, at 31; "Trend: Moving Offices to Where Transit Is", *Passenger Transport*, at 1 (December 8, 1971); *Transit Fact Book, supra* note 4, at 22.

and reduced particulate matter by 5,000 tons.[13] If 50 people ride a bus instead of drive, air pollution is reduced by 10 to 25 times.[14]

Energy conservation is a goal similarly served by mass transit operations. In 1980, the use of mass transit saved almost 40 million barrels of petroleum fuel.[15] As transit use increases, this figure will inevitably increase. In addition, should the Nation again be victimized by an energy crisis, urban areas will be dependent on publicly owned mass transit systems to bring people to work and to business shopping districts.

C. History Demonstrates That Mass Transit Operations Are Traditionally Matters Of State And Local Concern.

Historically, mass transit operations have been a matter of state and local concern. Initially, transportation systems were owned and operated by the private sector, but state and local governments have always been responsible for granting franchises and regulating routes, fares, schedules, and safety.[16] There is no similar history of federal regulation of transit operations, and even today mass transit regulation is primarily a local concern.

Over the last several decades state and local governments had to take over the operations of mass transit

[13] *Transit Fact Book, supra* note 4, at 38.

[14] *Moving People, supra* note 5, at 31.

[15] *Transit Fact Book, supra* note 4, at 25. 0.15 gallons of gasoline are saved for each trip on a transit vehicle instead of by automobile.

[16] *Munn v. Illinois*, 94 U.S. 113, 125 (1876): "[In the exercise of the police power] it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen . . . and in so doing to fix a maximum charge to be made for services rendered. . . ."

systems directly rather than to continue merely to regulate transit operations. Whereas mass transit operations used to be profit-making enterprises, it became apparent that if reasonably priced, universal, and dependable public transit was to exist, government ownership was required because transit operations were no longer profitable.[17]

Several factors have been identified as contributing to the decline of private mass transit operations. The general migration from the central city into the suburbs was greatly responsible for the decline in ridership from 13.8 billion passengers in 1950 to only 5.7 billion passengers in 1977.[18] At the same time that ridership was decreasing, the operating costs per transit mile were increasing at twice the annual rate of inflation.[19]

Aside from decreasing ridership and inflationary pressures, the other major causes of the decreased profitability of mass transit were rising labor costs, the use of public transportation to help meet social and environmental goals, and the high costs attendant to moving high concentrations of riders during peak rush hours.[20]

Private transit companies could cope with these increased costs in ways that only would serve to harm the public. The private companies could raise fares, cut ser-

[17]". . . [I]n recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten the continuation of this essential public service. . . ." National Mass Transportation Assistance Act of 1974, 49 U.S.C.A. §1601(4).

[18]*Moving People, supra* note 5, at 17.

[19]United States Department of Transportation, Urban Mass Transportation Administration, Institute of Public Administration, *Financing Transit: Alternatives For Local Government,* 8, 9 (July 1979).

[20]*Moving People, supra* note 5, at 17-19.

vices, reduce maintenance, or refuse to make necessary capital expenditures. The state and local governments responsible for ensuring that adequate transportation systems existed were faced with two choices. Either stand by as the private systems folded or reduced services, or, instead, move from being regulators of local transit operations to being providers of transit services. The state and local governments chose to provide for transit services themselves.

With public ownership of transit operations, the profit motive has disappeared as a factor in providing mass transit.[21] Low cost, universal, efficient mass transit operations are in existence today solely because state and local governments own and operate transit systems.

II. THE INTEREST OF STATE AND LOCAL GOVERNMENTS IN PROVIDING EFFICIENT AND REASONABLY PRICED TRANSIT SERVICES TO THEIR CITIZENS FAR OUTWEIGHS THE MINIMAL FEDERAL INTEREST IN IMPOSING THE FLSA ON PUBLIC TRANSIT SYSTEMS

The interests of the state and local governments far outweigh the minimal federal interest in this matter.

As noted earlier, mass transit is often the sole source of transportation for the poor, elderly, and handicapped. In addition, mass transit plays a crucial role in local economic development and land use planning. Mass tran-

[21]In 1980, fare revenues accounted for only 40 percent of the total operating revenues of transit systems. *Transit Fact Book, supra* note 4, at 45. Thus, transit fares would have to be increased by 2½ times in order for fares to equal costs. A 10 percent increase in fares reduces ridership by 3 percent. *Moving People, supra* note 5, at 25.

sit also plays a crucial role in reducing air pollution and conserving energy.

The application of the FLSA to publicly owned mass transit systems frustrates and impedes these local objectives. The increased costs imposed on public transit systems by the FLSA reduce both the quality and quantity of the services provided.

Wages for maintenance personnel, drivers, and administrative workers account for 80 percent of the cost of operating public transportation.[22] Labor costs alone are estimated to have accounted for over one-third of the total rise in transit costs since 1970.[23]

In 1980, preliminary studies indicated that the salary and wages of transit employees totalled just over $3 billion.[24] Each 1 percent increase in labor costs increases by $30 million the direct labor costs to public transit systems. In addition, a mere 1 percent increase in wages is, on average, matched by a 3.3 percent increase in fringe benefits and a 4.6 percent increase in premium and non-operating time payments.[25] The application of the FLSA to local transit systems therefore would impose substantial financial costs at a time when such systems are already operating at a combined deficit of almost $4 billion,[26] and when intense public pressure makes raising fares either impossible or counterproductive.[27]

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[22] *Moving People, supra* note 5, at 18.

[23] *Id.*

[24] *Transit Fact Book, supra* note 4, at 66.

[25] *Moving People, supra* note 5, at 18.

[26] *Transit Fact Book, supra* note 4, at 44. Deficits are measured by subtracting operating revenues from total expenses.

[27] See note 21, *supra*.

Increased costs are not the only adverse effect which compliance with the FLSA will cause publicly owned mass transit systems. The overtime provisions and their attendant costs will interfere with the manner in which mass transit services are provided. In order to avoid the increased overtime costs required by the FLSA, transit systems will have to alter working schedules to limit employee overtime. This could very well restrict the routes served by public mass transit systems. The minimum wage provisions might limit the number of low-skilled minority employees a system can employ, and might prevent or limit the employment of teenagers during the summer months.[28]

Simply stated, the FLSA coerces state and local governments into structuring employment practices in a manner that is harmful to the best interests of the overwhelming majority of the citizenry. Faced with increased costs, public transit systems must raise fares or decrease services. Raising fares makes the system less accessible to those who need it most, the poor; raising fares also decreases ridership and thereby lessens the overall benefits of transit operations.[29] Reducing services at a time when increased services are demanded is obviously not in the public interest.

The federal interest in applying the FLSA to publicly owned mass transit systems is minimal because transit employees are already very well paid. Between 1970 and 1977, wages in the transit industry rose by 61 percent and, by 1976, transit workers had the *highest* average earnings of any segment of public sector employees.[30]

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[28] *National League of Cities*, 426 U.S. at 846-49.

[29] *Moving People, supra*, note 5, at 18.

[30] *Id.* In 1976, the average wage was $16,032 per year.

In addition, transit workers generally have the benefit of collective bargaining to protect their rights.[31] It has been estimated by the American Public Transit Association that over 80 percent of public transit employees are unionized.

The combination of high wages and collective bargaining representation demonstrates that the federal interest in imposing the FLSA on publicly owned transit systems is minimal.

CONCLUSION

For the foregoing reasons, the National Institute of Municipal Law Officers respectfully urges this Court to affirm the decision below.

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[31] Urban Mass Transportation Act of 1964, 49 U.S.C. §1609(c) (1976 & Supp V. 1981), requires protection of transit employee rights in systems receiving federal aid.

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